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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 935

J. B. EDWARDS, RUTH BROUGHER and MONTE PRESTON,

Petitioners,

vs.

JOSEPH DINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 989

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J. B. Edwards, Ruth Brougher, and Monte Preston respectfully petition for a Writ of Certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Seventh Circuit, reversing a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, and remanding the case (R. 41). The judgment of the District Court had sustained the Amended Motion of Defendants to dismiss

the complaint of plaintiff, and dismissed said complaint (R. 27.). Memorandum opinion (R. 22-26 and Appendix hereof).

The first opinion of the Circuit Court of Appeals was filed October 16, 1946 (R. 38-41 and Appendix hereof), and a clarifying opinion was filed on November 21, 1946 (R. 61-62 and Appendix hereof), when appellee's petition for rehearing was denied.

SUMMARY STATEMENT.

This suit was commenced by the filing of a complaint by plaintiff on August 3, 1945, in the Superior Court of Cook County, Illinois. The suit was removed to the District Court of the United States on the grounds of diversity of citizenship. The record of the said Superior Court was filed in the District Court September 17, 1945 (R. 2-16). The defendants filed an Amended Motion to Dismiss the Complaint of plaintiff (R. 21-22) and the said motion was sustained, and the suit dismissed (R. 27). The complaint of plaintiff (R. 2-6) was and is as follows:

> Now comes Joseph Dine, plaintiff, by Aiken, McCurry, Bennett & Cleary, his attorneys, and complaining of J. B. Edwards, Ruth Brougher, and Monte Preston, defendants herein, alleges as follows:
>
> **Count I.**
>
> (1) That at all times hereinafter referred to there was in full force and effect, and still is, a certain statute of the State of Illinois, being Sections 329 and 333 of Chapter 38, Ill. Rev. Stat. 1945, as follows:
>
> "All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other

securities or conveyances made, given, granted drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property, or other valuable thing, won by any gaming or betting at cards, dice, or any other game or games, or betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be void and of no effect.

"All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements, and other acts, deeds, securities, or conveyances, given, granted drawn or executed, contrary to the provisions of this Act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser or other person interested therein; or if a judgment the same may be set aside on motion of any person aforesaid, on due notice thereof given."

(2) That on or about December 11, 1943, plaintiff purchased a certain two year old race horse named Valdina Lamar, that on or about June 1, 1944, plaintiff purchased a certain three year old race horse named First Command, and that on or about June 15, 1944, plaintiff purchased a certain three year old race horse named Colonel Al; that the present fair cash market value of the three aforenamed horses is $35,000; that subsequent to the purchase by plaintiff of each such horse plaintiff entered into an arrangement with defendant J. B. Edwards whereby plaintiff would inform defendant J. B. Edwards when either of the aforesaid horses were to run in a race which plaintiff

believed such horse would win, and that thereupon defendant J. B. Edwards would make a wager or wagers upon such horse, and if such horse won the race defendant J. B. Edwards would deduct from the winnings the amount of his wager, as aforesaid, and divide the net profits therefrom with plaintiff, or if such horse failed to win the race defendant J. B. Edwards would charge the amount of any wager made by him as aforesaid against the plaintiff.

(3) That up to and including August 22, 1944, defendant J. B. Edwards had charged against the plaintiff under the aforesaid arrangement the sum of $24,000, and that plaintiff then and there executed a chattel mortgage to the defendant J. B. Edwards for the sum of $24,000, charged against the plaintiff by the defendant J. B. Edwards as and for wagers made by defendant J. B. Edwards under the arrangement between him and plaintiff as hereinbefore set forth, and that such mortgage was executed by the plaintiff in order to avoid difficulty with which plaintiff was then and there threatened at the several race tracks in the United States, the terms and provisions of which chattel mortgage more fully appear from a copy thereof, attached hereto as Exhibit "A" and hereby made a part hereof.

(4) That on or about June 1, 1945, defendant J. B. Edwards represented to the plaintiff that plaintiff was then indebted to him for a total amount of $30,700, being additional amounts wagered by defendant J. B. Edwards under the arrangement with plaintiff as hereinbefore described, together with interest thereon; that defendant J. B. Edwards then and there informed plaintiff that defendant J. B. Edwards would foreclose his chattel mortgage upon the aforesaid horses unless plaintiff would agree to transfer title in such horses to defendant J. B. Edwards in exchange for an option to repurchase such horses within ninety days

for the amount which defendant J. B. Edwards claimed was then due him from plaintiff, or $30,700; that plaintiff, in order to avoid such threatened foreclosure by the defendant J. B. Edwards and to protect his interest in the aforesaid horses, signed a writing addressed to defendant J. B. Edwards requesting defendant J. B. Edwards to release plaintiff from the chattel mortgage indebtedness in exchange for a bill of sale from plaintiff and plaintiff's nominee, defendant Ruth Brougher, and an instrument designated "Bill of Sale", transferring title to the aforesaid horses from plaintiff and his nominee, defendant Ruth Brougher, to J. B. Edwards, copies of the aforesaid written request and bill of sale being attached hereto as Exhibits "B" and "C", respectively, and hereby made a part hereof.

(5) That thereafter, on June 23, 1945, the defendant J. B. Edwards executed a certain option in writing for the recited consideration of one dollar giving defendant Ruth Brougher, alone, the right to repurchase the aforesaid race horses for $30,700 on or before August 9, 1945; that the actions and conduct of defendants Ruth Brougher and J. B. Edwards, as aforesaid, amount to a fraud upon the plaintiff and constitute an unlawful conspiracy on the part of defendants J. B. Edwards and Ruth Brougher to defraud plaintiff of his property.

(6) That the defendant Monte Preston has actual possession of the aforesaid horses in Cook County, Illinois, and claims and asserts an interest in such horses.

(7) That by reason of the premises a right of action has accrued to the plaintiff under the Illinois statutes to set aside the chattel mortgage, bill of sale and option to repurchase, hereinbefore referred to for fraud and illegality.

Wherefore, plaintiff prays that the Court may order set aside the chattel mortgage, bill of sale and option to repurchase, hereinbefore referred to, and for such other, further and different relief in the premises as the nature and exigencies of the case may require and which might be deemed appropriate in equity.

Count II.

(1) That plaintiff adopts and hereby realleges paragraphs one to six, both inclusive, of Count I. hereof.

(2) That the defendant J. B. Edwards is a resident of the State of Louisiana and the defendants Ruth Brougher and Monte Preston are residents of the State of Texas; that the unlawful and fraudulent seizure by the defendants of plaintiff's right, title and interest in and to the aforenamed horses, as hereinbefore set forth, has given rise to a claim by plaintiff for the value of the chattels illegally appropriated as aforesaid against the defendants for the sum of $35,000.

(3) That the defendant Monte Preston, operating under the name and style of "Utopia Stable", presently is in possession of the aforenamed horses and is made a garnishee defendant in this cause in attachment proceedings filed herein by the plaintiff together with his affidavit of non-residence as by the statute in such case made and provided.

(4) That by reason of the premises a right of action has accrued to the plaintiff under the Illinois statutes to have an attachment against the property of his debtors where such debtors are not residents of the State.

Wherefore, plaintiff prays that summons may issue in this cause to the defendants and for service upon them by

posting and advertising in manner and form as provided by the Statutes in Attachment and Garnishment proceedings, and that Writs of Attachment and Garnishment may issue to the defendants herein under the aforesaid statute; that upon service of summons on the defendants herein, personally or by publication in accordance with the Attachment Act, and upon hearing of this cause that judgment may be entered in favor of the plaintiff for the sum of $35,000, together with statutory interest and costs, and for levy upon the attached property by execution issued herein, whether in the hands of an officer of the Court or secured by bond, and for the sale of such property levied upon by execution as in other cases.

Attached to the complaint are Exhibits as follows:

Exhibit A—chattel mortgage (R. 7-11)

Exhibit B—a letter which reads as follows: (R. 11-12)

"Chicago, Illinois.
"June 9, 1945.

"Mr. J. B. Edwards
"Oakdale, Louisiana.

"Dear Sir:

"This is to advise you that we have reached the conclusion that we will be unable to pay the indebtedness secured by chattel mortgage to you, dated August 22, 1944, and, therefore, request you to accept our bill of sale for the horses covered by said mortgage in consideration of your cancelling the indebtedness thereby secured.

"Yours very truly,
"Ruth Brougher Dine
"Joseph Dine"

Exhibit C—bill of sale (R. 12-14)

The amended motion of defendants to dismiss the complaint of plaintiff was and is as follows (R. 21-22):

> Now come the defendants, J. B. Edwards, Monte Preston and Ruth Brougher and move the Court to dismiss the action herein for the following reasons:
>
> 1. The complaint herein fails to state a claim upon which relief can be granted, for the following reasons:
>
> A. Plaintiff does not come into equity with clean hands.
>
> B. The allegations of the complaint indicate that plaintiff and Edwards were engaged in a joint enterprise or partnership to carry on unlawful gambling transactions and a court of equity will not lend itself to adjust disputes arising between such persons.
>
> C. The Illinois statute upon which this action is based has to do only with cases where the loser in a gambling transaction sues the winner to recover his losses, but there is no allegation that plaintiff Dine and defendant Edwards ever bet against each other.
>
> D. The plaintiff seeks this court of equity to reopen a completely executed adjustment which the parties have made of their differences thereby accomplishing an accord and satisfaction.
>
> E. The federal courts will not lend their aid to settle differences arising between gamblers.

The District Court sustained the amended motion of defendants and dismissed the suit (R. 27). Memorandum opinion (R. 22-26 also Appendix hereof). The opinion of the District Court and the opinions of the Circuit Court of Appeals were based solely on the Illinois Statute set out in the complaint of plaintiff.

If it be thought that there were other issues, such as fraud or conspiracy, presented by the complaint of plaintiff and the amended motion of defendants to dismiss same,

they were not dealt with by the said opinions. The fact is that no ultimate facts were alleged in plaintiff's complaint sufficient to support a charge of fraud or conspiracy. Exhibits attached to a pleading prevail over conclusions or general allegations of pleadings, and Exhibit "B" attached to the complaint of plaintiff and set out herein. (R. 11-12), shows clearly that when Dine finally gave the bill of sale to Edwards, the only consideration therefor was the cancellation of the mortgage indebtedness and the alleged option was not mentioned. The allegations of the complaint and the Exhibits attached thereto show that Dine never accepted Edwards' alleged offer that Dine transfer title to the horses to Edwards in exchange for an option to repurchase for $30,700.00, but on the contrary (Exhibit B, R. 11-12), Dine made a counter offer to Edwards, that Dine would transfer title to the horses to Edwards in exchange for the cancellation of the mortgage indebtedness of $24,-000, which offer Edwards accepted. Furthermore, the complaint of plaintiff refers to no statute other than the statutes pertaining to gaming, and then expressly states that the cause of action has accrued under the Illinois statutes. The only issue presented here is whether the complaint of plaintiff is good under the statute set out in said complaint.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended, 28 U. S. C. 347.

QUESTIONS PRESENTED.

The propositions of law presented by the complaint of plaintiff and the amended motion of defendants to dismiss same are as follows:

A, the owner of three race horses, entered into an agreement with B, whereby A would inform B when any of his race horses were to run in a race which A believed such horse would win, and that thereupon B would make a wager upon such horse; if the horse won, B would deduct from the winnings the amount of the said wager, and divide the net profits therefrom with A; if the horse failed to win, A would pay B the amount of the said wager. There came a time when A owed B $24,000.00 under said agreement, and A delivered to B his chattel mortgage note for said sum, secured by a chattel mortgage on the three horses. Then, on June 9th, 1945, A gave B a bill of sale to said horses in exchange for a cancellation of the chattel mortgage and the indebtedness secured thereby. Then on August 3, 1945, A filed his complaint in court against B, consisting of two counts, both relying on Chapter 38, Illinois Revised Statutes, 1945, Sections 329 and 333. By Count I, A prayed that the chattel mortgage and bill of sale be set aside. By Count II, A prayed judgment against B for the value of the horses, alleged to be $35,000.00, because of the alleged unlawful and fraudulent seizure of the horses by B.

1. Is A entitled to a decree setting aside the chattel mortgage and bill of sale?

2. Is A entitled to a judgment against B for the value of the horses?

3. A, having voluntarily performed his part of the said agreement by first giving B a chattel mortgage on the

horses for money which he owed B under the agreement, and later a bill of sale for the horses in consideration of the cancellation of the chattel mortgage indebtedness, is he entitled to a decree in a suit filed two months after the date of the bill of sale, setting aside the chattel mortgage and bill of sale, and is he entitled in said suit to a judgment against B for the value of the horses?

REASONS FOR GRANTING WRIT.

The Circuit Court of Appeals apparently did not approve the law of Illinois applicable to the issues presented to it, and it arbitrarily decided an important question of local law in a way which is in conflict with all of the applicable local decisions. Furthermore, the Illinois opinions and the opinion of the Supreme Court of the United States, cited by the Circuit Court of Appeals in its opinion as precedents, do not support its opinion, but on the contrary, if applicable at all, seem to hold contrary to its opinion. The real substance of the opinion of the Circuit Court of Appeals is that it will construe the statute in question for itself, and not follow the numerous opinions of the courts of Illinois since 1874, when the original statute was enacted.

The Illinois courts have construed the law applicable to the issues here presented many times. The substance of all of the Illinois opinions is that on the issues presented in this case, plaintiff cannot recover. If the opinion of the Circuit Court of Appeals is allowed to stand, it will create chaos in the law of Illinois on the proposition of law in question, because henceforth no person can determine whether the courts of Illinois will follow their previous opinions, or reject them and follow the said opinion of the Circuit Court of Appeals.

In construing the issue here presented, it must be remembered that this is not a case where the whole, or any part, of the consideration for the chattel mortgage or bill of sale in question was for money won by gaming, but on the contrary both parties were losers. After they had adjusted their respective losses pursuant to their agreement, one of them seeks to recover from the other the value of personal property which he had delivered to the other pursuant to their agreement, about 2 months before.

CONCLUSION.

Wherefore, the petitioners pray the granting of the writ of certiorari to the United States Circuit Court of Appeals for the seventh circuit.

EDWARD M. BURKE,
Attorney for Petitioners.

SUPPORTING BRIEF.

Illinois Revised Statutes, 1945, Chapter 38, Sections 329 and 333 were enacted March 27, 1874. They are set out in the complaint of plaintiff contained herein. Since the date of their enactment, the reviewing courts of Illinois have filed opinions sustaining petitioners' theory of the law, as follows:

In *Shaffner* v. *Pinchback* (1890) 133 Ill. 410, 24 N. E. 867, the highest court of Illinois held that where two persons are partners in the business of betting on horse races, and money is advanced by one to the other in furtherance of such transactions, there can be no recovery in an action of one of the partners against the other. The opinion mentioned the statute generally.

In *Boddie* v. *Brewer & Hoffman Brewing Co.* (1903) 204 Ill. 352, 61 N. E. 1047 the landlord sued the tenant at law for certain installments of rent due under a lease of premises used for gambling, and plaintiff had judgment; then, the defendant lessee filed his bill in equity to set aside said judgment because the premises had been used for gambling, and also to recover back some money which he had paid under executions levied on previous judgments for rent under said lease. The trial court held that the judgments were void and could not be collected, but that the money which the lessee had already paid under executions on judgments for rent under said lease could not be recovered back. The appellate and Supreme Courts affirmed. The sections of the Statute in issue in the case at bar were specifically referred to in the above citation although by section numbers under which they were then known.

In *Brooks* v. *Brady* (1894) 53 Ill. App. 155, the parties thereto had jointly bet and lost on an election. One having paid more than his share of the loss, the other gave him a note to adjust the difference. Plaintiff sued on the note. Defendant pleaded that the consideration for the note was illegal, being in violation of the statute relating to gaming contracts and obligations. The court held that the consideration was not within the inhibition of the statute and said at page 156:

> "It was not money won by the payee of the maker by betting with him upon the result of the election, but an amount paid by the payee to another for the maker after the loss had been sustained. We do not understand that such a consideration is within the statute."

Plaintiff had judgment against the defendant.

In *Suttle* v. *Finnegan* (1899) 86 Ill. App. 423, the court held, in a suit on a note, that it was reversible error for the trial court to refuse a proposition of law that a note given by one loser to another loser for the purpose of adjusting joint gambling losses is valid, and not within the prohibition of the statute in question. The judgment for defendant was reversed and the case remanded with instructions to enter a judgment for the plaintiff on the note.

In *Sternberger* v. *Wright* (1926) 239 Ill. App. 490, judgment was confessed upon a note. Defendant filed his motion to open the judgment and for leave to plead. He filed his affidavit in support of the motion. The trial court denied the motion. The Appellate Court said, page 491:

> "Even if the affidavit can be construed as showing that the parties jointly bet and lost money on games of chance, and that appellee paid more than his proportion thereof, and that appellant executed the note in question to adjust the differences between them, it has been held that a note given under such circumstances is a valid obligation, and not a gambling debt."

The judgment was affirmed. The opinion does not mention the statute, but it is clear that it was based thereon, because the affidavit of the defendant specifically stated that the consideration for the note was a gambling debt, and prohibited by law. The reference to "prohibited by law" clearly means the statute.

In *Brelesford* v. *Stoll* (1940) 304 Ill. App. 222, 26 N. E. 2d 159, the court held that where two persons are engaged in a joint unlawful transaction, as gaming, whether as partners or joint adventurers, and one takes advantage of the other, and appropriates more than his proportion of the spoils, courts of equity will not assist either, but will leave them where they place themselves. The statute in question was expressly cited. This is the last Illinois case on the issue here presented and it strongly supports petitioners' contention.

Petitioners insist that it is clear from the foregoing citations that the Illinois courts in construing the statute in question have consistently held that when two parties jointly engage in a gambling transaction, and both parties lose in such transaction, and thereafter adjust their losses between themselves by one of them paying money or delivering personal property to the other, that the party so paying money or delivering personal property, cannot thereafter have a decree setting aside a bill of sale to the personal property, or sue for and recover back, the money or the value of the property so paid.

We now refer to the cases cited by the Circuit Court of Appeals in support of its opinion, for the purpose of showing that they do not support it.

In *Pearce* v. *Rice,* (1891), 142 U. S. 28. 12 S. Ct. 130, the facts were as follows: A owed B, a stock broker, a balance on gambling transactions on the Chicago Board of Trade.

He paid the balance by assigning, and guaranteeing payment of, the note of C payable to A. B gave the note, with the guarantee thereon, to D, as collateral for a loan. The loan not having been paid in full, D sued A on the guarantee, and had judgment for the full amount of the note. B did not owe D the full amount of the judgment. This Court held that although B could not recover from A, on A's guaranty on the note, that D, being a bona fide holder, could recover from A, but only to the extent that B owed D, and that the remainder of the judgment was void. The holding of this Court was, that if A gave B his note in payment of a gambling transaction, B could not recover from A thereon, but if B transferred the note to C, a bona fide holder for value, that C could recover from A the amount that he paid B for the note. Petitioners insist that this citation by the Circuit Court of Appeals in support of its opinion, has no bearing whatever on the issues in the case at bar.

In *West* v. *Carter* (1889) 129 Ill. 249, 21 N. E. 782, West claimed that his horse won in a horse race, and he was entitled to the sum paid by the track to the winning horse. The track claimed that West's horse did not win. West sued the track before a Justice of the Peace, and had judgment for one-half of the purse. The track then appealed to the Circuit Court of Cook County, and filed an appeal bond with Carter as surety. The said appeal was dismissed. West sued Carter as surety on the appeal bond.

Carter defended on the theory that the judgment entered by the Justice of the Peace was founded upon a gambling contract, and therefore, the judgment and bond were void. Judgment was for the defendant, but the Appellate Court reversed said judgment, and held that Carter, being surety on the appeal bond, could not interpose the defense that the judgment was void because based on a gambling trans-

action. Then Carter filed his bill in equity in the Superior Court of Cook County, setting up the facts and claiming that West should not recover from him. That court held that West could not recover. The Appellate Court affirmed, and the Supreme Court of Illinois held West could recover and remanded the case to the Superior Court with instructions to dismiss the bill. The Supreme Court held that Carter was not a person interested either in the original contract or in the judgment of the Justice of the Peace; that he was a mere volunteer, who signed the appeal bond as a surety, and when the judgment was not paid, he became liable therefor, as surety. Petitioners insist that this citation by the Circuit Court of Appeals has no bearing whatever on the issues in the case at bar.

In *Harris* v. *McDonald,* (1901) 194 Ill. 75, 62 N. E. 310, A leased to B certain premises to be used as a gambling house, and C, not knowing that the premises were to be so used, guaranteed the payment of the rent, without receiving any money or property for said guarantee. A sued C on the guarantee for unpaid rent, and had judgment, which was affirmed by the Appellate Court. C then filed his bill in equity, praying to set aside said judgment, and have his guarantee declared void, because the lease involved gambling transactions. He had a decree as prayed, which was affirmed by the Appellate Court, and the judgment of the Appellate Court was affirmed by the Supreme Court in this citation. Petitioners insist that this citation by the Circuit Court of Appeals has no bearing whatever on the issues in the case at bar.

In *Mulcahy* v. *Vehon* (1923) 229 Ill. App. 454, A gave his note to B, the consideration being a gambling transaction involving the future differences in the price of grain. B sued A on the note, and for some reason not clearly disclosed by the above opinion, A was not present at the trial,

and judgment was entered against him. A then filed his bill in equity, praying that the said judgment against him be vacated and set aside, because based on a gambling transaction. A decree was entered enjoining the collection of the judgment, and affirmed in the above citation. Petitioners insist that this citation by the Circuit Court of Appeals has no bearing whatever on the issues in the case at bar.

The Circuit Court of Appeals cited no other cases in support of its opinion construing the statute in question.

Your petitioners say that it is clear from the opinion of the Circuit Court of Appeals that it thought that the Illinois courts had not properly construed the sttaute in question, and that therefore, it would construe the statute as it thought the statute should be construed. By so doing, the Circuit Court of Appeals decided an important question of local law in a way which is in conflict with all of the applicable local decisions.

SPECIFICATIONS OF ERRORS.

The court below erred:

(1) In reversing the judgment of the District Court.

(2) In construing Illinois Revised Statutes, 1945, Chapter 38, Sections 329 and 333.

(3) In disregarding all of the applicable decisions of the courts of Illinois, construing a statute of Illinois, and placing its own construction thereon.

Wherefore, petitioners pray the granting of a writ of certiorari to the United States Circuit Court of Appeals for the seventh circuit.

Respectfully submitted,

EDWARD M. BURKE,
Attorney for Petitioners.

APPENDIX.

The memorandum opinion of the District Court (R. 22-27) (not reported) was as follows:

This proceeding was instituted by Joseph Dine in the Superior Court of Cook County, Illinois, on August 3rd, 1945, against defendants J. B. Edwards, Ruth Brougher, and Monte Preston. Defendants removed the case to this court on the ground of diversity of citizenship.

Plaintiff seeks to have set aside a chattel mortgage, a bill of sale and an option to repurchase three race horses, Valdina Lamar, First Command, and Colonel Al, on the ground that they were executed and delivered as a result of certain gambling transactions, and under the statutes of Illinois are therefore void and of no effect.

In Count I of his complaint plaintiff sets out that his action is brought under Sections 329 and 333, Chapter 38, Ills. Rev. Stats. 1945, which provides:

Section 329:

> "All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgaged, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any gaming, or betting at cards, dice, or any other game or games, or betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unkown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be void and of no effect."

Section 333:

> "All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements, and other acts, deeds, securities, or conveyances, given, granted, drawn or executed, contrary to the provisions of this Act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser or other person interested therein; of it a judgment the same may be set aside on motion of any person aforesaid, on due notice thereof given."

Count II realleges paragraphs 1 to 6 of Count I, and then asks for a writ of Attachment and Garnishment against the defendants.

Both sides agree that the indebtedness which was the consideration for the chattel mortgage and bill of sale here in question was a gambling transaction.

Plaintiff, pursuant to an order of court, filed a bill of particulars, after which defendants moved to dismiss the complaint, which motion to dismiss plaintiff moved to strike. Subsequently defendants asked leave to file an amended motion to dismiss, and the matter is now before me on defendants' amended motion to dismiss the complaint and plaintiff's motion to strike the same.

It is agreed that this case arises out of certain gambling transactions between Dine and Edwards, involving betting on various horse races. The courts of Illinois have held that betting money on horse races is gaming, in violation of the statutes of the state. *Shaffner* v. *Pinchback,* 133 Ill. 410. *Tatman* v. *Strader,* 23 Ill. 494.

In the case of *Shaffner* v. *Pinchback, supra,* Shaffner brought an action against Pinchback to recover the sum of $1,000, alleged to have been loaned by him to Pinchback. The evidence showed that the money was intended to be and was actually used as capital in the business of "making books" on horse races, and the court held that betting money on a horse race is gaming and is prohibited by the statute, and that a contract in aid of the offense is void, and cannot

be recovered upon. In deciding this case the Supreme Court of Illinois said:

> "It is urged that the view that defendant can keep the $1000. furnished by plaintiff, without any consideration therefor, is so opposed to reason and conscience as to be untenable. The judgments of the trial and the Appellate Courts are conclusive of the fact that plaintiff and defendant jointly engaged in a business which was in violation of law. They were, in respect to such business, *in pari delicto*, and the law will refuse its aid to assist either, but will leave them in the positions in which they have placed themselves. Plaintiff in error having embarked his money in an enterprise prohibited alike by the statute, by good conscience and by public policy, placed himself and his money outside of the pale of the law, and if he has been despoiled by the failure of his associate to account for the funds placed in his hands for the purpose of carrying on the unlawful business, then both good morals and public policy require that the law should not aid him."

In the case of *Boddie* v. *Brewer and Hoffman Brewing Co.*, 204 Ill. 352, the court held that complainant, having knowingly entered into a lease of property for use as a gambling house in violation of statute, a court of chancery will leave complainant where it finds him, and will not interpose to assist him in recovering back money paid in furtherance of such unlawful leasing, though the payment was coerced by an execution issued upon a judgment at law.

Brelsford v. *Stoll*, 304 Ill. App. 222, involved a suit for dissolution and accounting with respect to an alleged partnership relationship for the purchase, location and operation of pinball machines. The Appellate Court, in denying plaintiff equitable relief, said:

> "The alleged contract was illegal and void from its inception as contravening the provisions of the gaming statute of Illinois and against public policy and was therefore unenforceable in whole or in part in a court of equity. All contracts and agreements entered into or executed by any person whatsoever, where the

whole or any part of the consideration thereof shall be any money, property or valuable thing won by gaming is expressly declared by Sec. 329, Chap. 38, Ill. Rev. Statutes 1939, to be void and of no effect.

"Where persons engage in the unlawful business of gaming, courts will not assist either one but will leave them where they placed themselves. *(Samuels* v. *Oliver,* 130 Ill. 73.) As is said in *Shaffner* v. *Pinchback,* 133 Ill. 410: 'Plaintiff in error having embarked his money in an enterprise prohibited alike by the statute, by good conscience and by public policy placed himself and his money outside of the pale of the law, and if he has been despoiled by the failure of his associate to account for the funds placed in his hands for the purpose of carrying on the unlawful business, then both good morals and public policy requires that the law should not aid him.'

"This principle was early announced and has been uniformly adhered to by the courts of review of this state. In the case of *Miller* v. *Davidson,* 8 Ill. (3 Gil.) 518, decided in 1846, Justice Caton used this language: 'No principle is better settled, than that where two or more persons embark in an unlawful transaction, and one gets the advantage of the others, and appropriates more than his proportion of the spoils to himself, the court will not interfere to make him divide with the others. As they commenced with a violation of the law, they cannot invoke its aid in any way. The law will not meddle with gains obtained by its outrage, as between those who have been engaged in trampling it underfoot.

"The above principle was again cited with approval in *Mitchell* v. *Clem,* 295 Ill. 150, and in the recent case of *Klein* v. *Chicago Title & Trust Co.,* 295 Ill. App. 208. In the case of *Mitchell* v. *Clem, supra,* it was further held that while ordinarily, as between the parties, a defense must be set up in the answer, a bill in chancery could be dismissed if the chancellor found that the public interest and the rules of equity demanded such a decree. It was there said (p. 156): 'Another application of the rule of equity is, that where a contract is illegal or against public policy a court of equity will not, at the suit of one of the parties who partici-

pates in the illegal or immoral intent, either compel the execution of the agreement or set it aside after it has been executed, because to give relief in such a case would injure and counteract public morals. * * * (citing cases.) This application of the rule is not in the interest of any party to the illegal or immoral transaction but in the public interest, and so far as dismissing the bill is concerned, the chancellor might do that and leave the parties where he found them without the defense being set up in the answer.'

"To the same effect is the case of *Vock* v. *Vock*, 365 Ill. 432 * * * wherein the above quoted language and citations are restated with approval by the court, and it is further there said that: 'The law is that where the parties are *in pari delicto* no affirmative relief of any kind will be given to one against the other.'"

Plaintiff's motion to strike defendants' motion to dismiss is denied, and defendant's motion to dismiss is allowed.

The two opinions of the Circuit Court of Appeals, (R. 38-41; R. 61-62) were as follows:

Before SPARKS and KERNER, *Circuit Judges*, and BRIGGLE, *District Judge*.

KERNER, *Circuit Judge*. By his complaint plaintiff sought to set aside a chattel mortgage, a bill of sale, and an option to repurchase three race horses. Jurisdiction rested upon diversity of citizenship and the requisite amount in controversy. The District Court, on motion of the defendants, dismissed the complaint for failure to state a claim upon which relief could be granted.

The complaint alleged that while plaintiff was the owner of three race horses he entered into an agreement with defendant Edwards whereby Edwards would make wagers upon the horses, and if the horses won, Edwards would deduct from the winnings the amount of the wagers and divide the net profits therefrom with plaintiff, but if the horses failed to win the race the loss would be charged against plaintiff; that up to August 22, 1944, Edwards had advanced $24,000 for which plaintiff executed a chattel mortgage in which he pledged the three horses as

security; and that on or about June 1, 1945, Edwards represented to plaintiff that plaintiff was then, under the arrangement mentioned, indebted to Edwards in the sum of $30,700 and informed plaintiff that he would foreclose the chattel mortgage unless plaintiff agreed to transfer title to the horses to Edwards in exchange for an option to repurchase the horses within ninety days, whereupon plaintiff executed a bill of sale transferring the title to the horses to Edwards.

The complaint further alleged that under the statutes of Illinois the execution of any chattel mortgage or bill of sale where the whole or any part of the consideration thereof was a gambling transaction, is void and of no effect; that all mortgages or conveyances executed contrary to the provisions of the statutes may be set aside and vacated upon a bill filed for that purpose, by the person executing the same; and that by reason of these premises a right of action has accrued to plaintiff to set aside the chattel mortgage, bill of sale, and option to repurchase.

In the District Court, in support of the motion to dismiss, defendants asserted that a court of equity will not adjust disputes arising out of gambling transactions. The trial judge, after stating that it was agreed the case arose out of certain gambling transactions between Dine and Edwards involving betting on various horse races, gave as his reason for dismissing the complaint, that the courts of Illinois have held that betting money on horses is gaming, in violation of the statutes, and that where the parties are in *pari delicto,* no affirmative relief will be given to one against the other, but each party will be left to enjoy all that he has been able to obtain in the iniquitous transaction.

In this court defendants, relying solely on general equitable principles, reiterate the argument made in the District Court and cite, among other cases, *Shaffner* v. *Pinchback,* 133 Ill. 410; *Boddie* v. *The Brewer & Hoffmann Brewing Co.,* 204 Ill. 352; *Brelsford* v. *Stoll,* 304 Ill. App. 222; and *Israel* v. *Selman,* 263 Ill. App. 351.

It is true that betting money on a horse race is gaming and in violation of law, *Shaffner* v. *Pinchback, supra,* and where parties engage in the unlawful business of gaming, courts will not assist either one, but will leave them where

they place themselves; yet, the question remains whether these principles are applicable here. We think they are not.

As to the substantive rights of the parties in this case, there can be no question but that the state laws are the controlling rules of decision. It has been so held, *Huddleston* v. *Dwyer,* 322 U. S. 232, and wherever those laws have been authoritatively declared by the State, whether its voice be the legislature or its highest court, such laws ought to govern in litigation founded on them, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity, *Guaranty Trust Co.* v. *York,* 326 U. S. 99. And we know that the public policy of a State is to be found in its constitution and statutes, *Electrical Contractors' Ass'n* v. *A. S. Schulman Electric Co.,* 391 Ill. 333. We, therefore, seek to ascertain what the public policy of Illinois is upon the question at hand.

Section 329, chap. 38 Ill. Rev. Stat. 1945, provides that "All * * * agreements, * * * mortgages, or * * * conveyances * * * where the whole or any part of the consideration thereof, shall be for any money * * * won by * * * wager or bet upon any race, * * * or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet, to any person or persons, so gaming or betting * * * shall be void and of no effect," and § 333 provides that "All * * * mortgages, * * * agreements, * * * or conveyances, given, granted, drawn or executed, contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into, or executing the same * * *."

Under these statutes the declared policy of the State is that all agreements, mortgages or conveyances, where the whole or any part of the consideration thereof shall be for any money won by wager or bet upon any race, shall be void and of no effect, and the statutes clearly authorize the filing of a bill in equity to set aside such mortgage or conveyance. In the case of *West* v. *Carter,* 129 Ill. 249, 254, the court, in construing the statute here involved, said: " 'It was the intention of the legislature to make all * * * contracts * * * absolutely void,—of no vitality,—

and they can not be vitalized by the action of any court.' " And the court held that relief may be granted in a court of equity to vacate and set aside contracts obtained in violation of these statutes. See also *Pearce* v. *Rice*, 142 U. S. 28; *Harris* v. *McDonald*, 194 Ill. 75; and *Mulcahey* v. *Vehon*, 229 Ill. App. 454. To us it is plain that to deny plaintiff the right to seek to set aside the mortgage and bill of sale would vitalize the instruments mentioned.

The judgment appealed from is reversed and the cause is remanded to the District Court.

ON PETITION FOR REHEARING.

Before SPARKS and KERNER, *Circuit Judges*, and BRIGGLE, *District Judge*.

KERNER, *Circuit Judge*. In his petition defendant believes he has uncovered an omission in the opinion in that it is not decisive of all the questions presented.

It is claimed that we took the position that the applicable Illinois statute requires that the chattel mortgage, bill of sale, and option to repurchase be set aside in accordance with the prayer of Count 1, but that the sufficiency of the cause of action in Count 2, which sought damages for conversion of the property, was not reached by the District Court and, while raised here initially, was not considered by this court. It is true we were content to consider only the allegations in Count 1, but, as will be shown, no error was committed.

The defendants' motion to dismiss the complaint which was sustained by the trial court stated in part: "The complaint herein fails to state a claim upon which relief can be granted." The District Court thereby rejected the allegations in Count 2 as specifically as the allegations in Count 1, and it is incorrect for the defendants to say as they do that the point of Count 2 arose for the first time in this court. Upon appeal both counts were before this court just as they were before the District Court. Moreover, an examination of the complaint discloses that an identical cause of action is set out in the two counts due to an incorporation in Count 2 of the principal allegations of Count 1. They are distinguished only by the remedies sought. Count 1 prays that the documents in question be

set aside, and Count 2 prays that, the property having been illegally appropriated, a judgment against defendants for its value be entered.

It is logical that the District Court in emphasizing its rejection of the allegations of Count 1 necessarily did not repeat itself in rejecting the allegations of Count 2. The opinion of this court likewise confined itself to a consideration of the allegations of Count 1. It is clear, however, that the allegations of Count 2 were held sufficient by this court and an order will be so entered.

The petition for rehearing is denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 935

J. B. EDWARDS, RUTH BROUGHER and MONTE PRESTON,

Petitioners,

vs.

JOSEPH DINE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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I.

May It Please The Court:

There is no conflict of decisions presented by the record, and the Circuit Court of Appeals followed the law of the courts of Illinois.

The only chaos resulting from the decision is in the minds of the petitioners, arising from their refusal or in-

ability to comprehend the Statute upon which the action is predicated.

The chancellor in his opinion said (R. 24):

> "Both sides agree that the indebtedness which was the consideration for the chattel mortgage and bill of sale here in question was a gambling transaction.
>
> ". . . It is agreed that this case arises out of certain gambling transactions between Dine and Edwards involving betting on various race horses."

The trial court further concluded that the action was brought under the Illinois Statute providing for the cancellation and setting aside of any instrument which has for its consideraton the reimbursement or repayment of any money lent or advanced for use in betting on race horses.

In his opinion the chancellor said (R. 23):

> "Plaintiff seeks to have set aside a chattel mortgage, a bill of sale and an option to repurchase three race horses, Valdina Lamar, First Command and Colonel Al, on the ground that they were executed and delivered as a result of certain gambling transactions, and under the statute of Illinois are therefore void and of no effect. In count 1. of his complaint plaintiff sets out that his action is brought under sections 329 and 333, chapter 38 (Criminal Code), Ill. Rev. Stat., 1945, which provide: '(Section 329) All . . . agreements, . . . mortgages, or . . . conveyances . . . where the whole or any part of the consideration thereof shall be for any money . . . won by any gaming or . . . wager or bet upon any race, . . . or for the reimbursing or paying any money or property knowingly lent or advanced . . . to any person . . . so gaming or betting . . . shall be void and of no effect.' '(Section 333) All . . . mortgages, . . . agreements, . . . or conveyances, given, granted, drawn or executed, contrary to

> the provisions of this Act, may be set aside and vacated by any court of equity, upon bill filed for that purpose by the person so granting, giving, entering into, or executing the same' . . ."

The respondent prayed an appeal from the judgment dismissing the case (R. 27). No error was assigned nor exception taken by petitioners to the order of dismissal and judgment.

It is evident from the record that the matter was presented squarely to the chancellor on the proposition that the indebtedness which was the consideration for the chattle mortgage and bill of sale was a gambling transaction and void under Section 329 of Chapter 38, Illinois Revised Statutes, 1945, and that the cause of action was further predicated upon Section 333, Chapter 38, Illinois Revised Statutes, 1945, providing for the cancellation and setting aside by bill in equity of any instrument, conveyance, etc., which has for its consideration any money won by gaming or wager or bet upon any race, *or for the reimbursing or paying* of any money knowingly lent or advanced for use in betting on horse races.

The chancellor in spite of these conclusions (R.. 23) dismissed the cause on grounds of "public policy" or "public morals" and in conformity with the fundamental principles of equity (R. 25, 26), thus giving support to the grounds advanced by petitioners in their motion to dismiss (R. 22).

The petitioners in their petition for rehearing (R. 45) at no time asserted that the Circuit Court of Appeals had decided the case according to wrong principles or in conflict with cited authorities (R. 55). They were "in accord

with most of the propositions advanced by respondents, except that *Pearce* v. *Rice* is far from being in point when applied to the case at bar" (R. 56).

The history of the decisions of the reviewing courts of Illinois as advanced in the supporting brief of the petition for certiorari (pp. 13-18) is grossly misleading, due to the confusion of the petitioners and their apparent inability to properly analyze these cases.

Sections 329 and 333, chapter 38, Illinois Rev. Stat., 1945, were first enacted in 1874. They have from time to time in the reclassification of the Statutes borne different numbers, but the text has remained the same. This particular group of Statutes under different sections prohibits the renting of premises for gambling purposes, gambling in grain futures, gambling at dice, gaming, betting on horses and (Sec. 329) declares all promises, notes, covenants, conveyances, etc. drawn or entered into where the whole or any part of the consideration shall be money won at gaming or for the reimbursing or paying any money knowingly lent void and of no effect. This Section 329 is one of the sections under which the complaint was filed (R. 2).

Section 333 of Chapter 38 provides the method for setting aside judgments, mortgages, covenants and agreements given contrary to the provisions of the Act—the method being by bill in chancery filled for that purpose by the person so granting or entering into such agreement. For convenience, we set out Section 333:

> "All judgments, mortgages, assurances, bonds, bills, specialties, promises, covenants, agreements, ments, and other acts, deeds, securities, or conveyances, given, granted, drawn or executed, contrary to

> the provisions of this Act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser or other person interested therein; or if a judgment the same may be set aside on motion of any person aforesaid, on due notice thereof given."

Taking the cases in the order cited by petitioners, we will show their impertinence to the case at bar.

Shaffner v. *Pinchback,* 133 Ill. 410, was a suit at law between persons engaged in a gambling transaction. It was not a suit brought under the Statute to set aside conveyances and has no application here.

Boddie v. *Brewer & Hoffman Brewing Co.,* 204 Ill. 352, was a suit instituted under Sections 329 and 333 of Chapter 38, Ill. Rev. Stat., 1945, and is strongly adverse to the petitioners. We shall analyze this case later.

Brooks v. *Brady,* 53 Ill. App. 155, one of the "overlooked cases" cited by petitioners (R. 46) was a suit at law on a note. Defense was interposed that the consideration was a gambling transaction. Held that it was not a gambling transaction and not within the inhibiton of the Statute. This was not a suit in equity brought under the Statute for the purpose of setting aside a conveyance, the consideration for which was a gambling transaction.

Suttle v. *Finnegan,* 86 Ill. App. 423, another "overlooked case," was likewise a suit at law on a note. The Statutes invoked in the case at bar were not in issue.

Sternberger v. *Wright,* 238 Ill. App. 490, the third of the "overlooked" cases was, like its two predecessors, a suit at law on a note.

Apart from the fundamental difference that none of the above cases were suits in equity brought under the Statute, with the exception of *Boddie* v. *Brewer & Hoffman Brewery Co.*, there is the salient difference that in each of these cases there was a dispute as to whether these transactions between the parties were gambling transactions, whereas in the case at bar the *petitioners admit the transactions were gambling and the consideration for the chattel mortgage and bill of sale was based on a gambling transaction* (R. 24).

Brelesford v. *Stoll*, 304 Ill. App. 222, was a suit in equity for dissolution of a partnership and an accounting. The business of the partnership was that of making gambling machines prohibited by law. Upon general equitable principles the action was dismissed.

It is difficult to understand the petitioners' persistent refusal to become cognizant of the fact that the case at bar is taken out of the general equitable rules of law by the Statute and that the respondent is proceeding solely and exclusively under Sections 329 and 333, Chap. 38, Ill. Rev. Stat., 1945.

Boddie v. *Brewer & Hoffman Brewing Co.*, 204 Ill. 352, distinctly gives the Illinois courts' interpretation of the law involved in the instant case and is in complete harmony with the decision of the Circuit Court of Appeals here. The facts in the *Boddie* case are: Boddie sued the Brewing Company and obtained judgments in two separate suits at law in the Superior Court of Illinois, one in March, 1897, and the other in March, 1899. The judgments were for installments of rent due upon a lease executed by Boddie to the Brewing Company and others. The Brewing Com-

pany defended these suits and the judgments were based upon the verdict of a jury after trial. The Illinois Appellate and Supreme Courts affirmed these judgments. The defenses interposed to these suits *were other than that the premises* were leased for the purpose of carrying on gambling. The Brewing Company then filed a bill in equity under the Illinois Statute, Sections 127 and 135 (Section 135 then being Section 333 now) to vacate these judgments. The Illinois Supreme Court in this case went so far in upholding the right of the Brewing Company to come into equity under the Statute for the purpose of setting aside judgments, conveyances, etc., that it held the failure of the Brewing Company to set up in its defense of the two cases at law that the lease was void because the premises were rented for gambling purposes did not preclude it from asserting this for the first time in the suit in equity under the Statute. We quote from the decision (p. 354):

> "As the defense could have been interposed in the actions at law in which the judgments sought to be set aside were rendered, did the fact that appellee company knew the premises were leased for a gambling house make it necessary that it should plead that fact when sued for rent upon the lease, or could it appear and interpose other defenses to the actions, and after judgments had been rendered against it, raise the question that the premises had been leased for use as a gambling house by bill in equity to set aside the judgments. We think under the authority of *Mallett* v. *Butcher*, 41 Ill. 382, *Lucas* v. *Nichols*, 66 Ill. 41, *West* v. *Carter*, 129 Ill. 249, and *Harris* v. *McDonald*, 194 Ill. 75, it could. . . . It was the intention of the legislature to make all judgments, like all contracts on which they were founded, absolutely void and of no vitality, and they cannot be vitalized by the action of any court."

And at page 355 the Court said:

> "In the cases above referred to the general doctrine is recognized that where a party has a defense to an action at law and he fails to make it or fails to bring forward his entire defense, a court of equity will not relieve him, but it is said in cases falling within the statute passed for the purpose of prohibiting gambling are by force of the Section 135 (now 333) taken out of the general rule."

Pearce v. *Rice*, 142 U. S. 28, is claimed by the petitioners as having no bearing on the issues in the case at bar. In order to demonstrate clearly the applicability of *Pearce* v. *Rice*, 142 U. S. 28, and to show its remarkable similarity to the case at bar, we wish to quote from the opinion by Mr. Justice Harlan (pp. 34-37):

> "The statute of Illinois referred to—being the part of the Criminal Code of that State, relating to 'Gambling and Gambling Contracts'—provides: . . .
>
> " 'Sec. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any . . . wager or bet upon any . . . chance, . . . or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such . . . bet, to any person or persons so gambling or betting, . . . shall be void and of no effect.
>
> " 'Sec. 135. All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements and other acts, deeds, securities or conveyances, given, granted, drawn or executed, contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for that

purpose, by the person so granting, giving, entering into or executing the same' . . .

"The (defendant) invokes . . . the rule recognized in the courts of the United States, that equity will not, at the instance of one against whom a judgment at law has been rendered restrain the operation or effect of that judgment, unless there be equitable circumstances justifying its interference. . . .

"The courts of Illinois have not regarded these rules as strictly applicable in cases under the law relating to gambling and gambling contracts. In *Mallett* v. *Butcher*, 41 Illinois 382, 385, the Supreme Court of that State, construing the statute in question held that all contracts having their origin in gaming were void, not voidable only, and that it was entirely immaterial when or how the fact was disclosed to the court; consequently, a suit in equity would lie to set aside a judgment at law on a note given for money lost in gaming with cards . . . The same question arose in *West* v. *Carter*, 129 Illinois, 249, 254 . . . The judgments, promises and instruments therein specified being void and of no effect, it is not,' said the court, 'in the power of the party to whom made, granted, given or executed, or in whose interests they are drawn or entered into, to give the contract validity. Nor can the court, at the instance of such party, any more than it could have by the confession or consent of the defendant, vitalize the contract, and by its judgment defeat the effectiveness of the proceeding in equity authorized by the . . . statute to set aside the void contract . . . The rule in equity that courts of chancery will not take jurisdiction when there is an adequate defence or remedy at law, must yield to the requirements of this statute, that relief may be granted in a court of equity to vacate and set aside judgments and contracts obtained in violation of this provision."

We think it plain from petitioner's comment on the *Pearce* case that they not only misapprehend the purport

of *Pearce* v. *Rice,* but also of the case at bar. They are in a whirlpool created by their belief on one hand that it is a cause based on general equitable proceedings to which the doctrine of *pari delicto* will apply, and, on the other hand, that it is a suit at law to which they can interpose the defense of illegality by reason of gambling. Nowhere in the entire record do they perceive that the case at bar is a suit in equity brought under a specific Illinois Statute to set aside a conveyance, the consideration for which is gambling. Nor do they comprehend that the record clearly shows that they admitted that the transactions were gambling transactions. It is further evident that they are unable to discern that the Illinois Courts and the United States Supreme Court have upheld the provisions of these Statutes in passing upon contentions analagous to those made by the respondent in the instant case.

Harris v. *McDonald,* 194 Ill. 75, was a bill in equity filed under the Statutes relied on in the case at bar to set aside a judgment. Harris proceeded against McDonald on the latter's guaranty for the payment of rent on a lease between Harris and one Hogan, and to set aside and cancel a certificate of sale of McDonald's premises, which had been sold under *fieri facies* execution issued on the judgment and for an injunction restraining Harris from bringing any more suits on the guaranty. The relief prayed for was granted and appeals to the Illinois Appellate and Illinois Supreme Courts were affirmed.

The Court in *Harris* v. *McDonald,* 194 Ill. 75, said (p. 79):

> "And it follows that if the contract of guarantee of the appellee (McDonald) and the judgment thereon rendered against him fall within the things enumerated in Section 135 (now Section 333) as 'all judgments,

> mortgages, assurances, bonds, notes, specialties, promises, covenants, agreements, ands other acts, deeds, securities or conveyances, given, drawn or executed contrary to the provisions of this act' (the act in question), such guarantee may be set aside in equity. . . . It cannot be doubted then that the lease and the covenant therein to pay rent were contrary to the provisions of Section 127 and that it and the judgment would on sufficient proof be set aside in equity under Section 135 (now Section 333)."

West v. *Carter*, 129 Ill. 249, was a case brought under the same sections of the Illinois Statutes as the case at bar. The relief prayed for was granted and affirmed by the Appellate Court. On appeal to the Supreme Court the case was reversed only because Carter was not an interested person within the purview of the Statutes. It has not been contended by the petitioners that Dine is not such an interested person. The Supreme Court of Illinois states (p. 253):

> "We should perhaps notice the contention of counsel for appellant that Sections 131 and 135 can have no application unless rendered by confession. . . . We are not prepared to so restrict the operation of this statute. By Section 131 all promises . . . executed . . . where the consideration thereof shall be for money won by any gaming . . . or wager or bet upon any horse race, etc., are made not only voidable but absolutely voidable and of no effect. Being void it is not in the power of the party to whom made . . . to give them vitality. Nor can the court at the instance of such party any more than it could by the confession or consent of the defendant vitalize the contract and defeat the effectiveness of the proceedings in equity authorized by the 135th section (now 333) of the statute to set aside the void contract. . . . It was the intention of the legislature to make all judgments like the contracts upon which they are founded absolutely void—of no vitality."

In *Mulcahy* v. *Vehon*, 229 Ill. App. 454, it was held that this language was not dictum, page 461.

It is evident that the courts of Illinois with monotonous repetition, even in cases relied upon by the respondents, assert that gambling contracts are void and the Illinois legislature has provided that by suit in equity these contracts may be set aside. With the same monotonous repetition they state that these contracts can not be vitalized. To disturb the opinion of the Circuit Court of Appeals would be giving vitality to the chattel mortgage and the bill of sale.

Mulcahy v. *Vehon*, 229 Ill. App. 454, seems to the petitioners a further case that has no bearing on the issues in the case at bar. It is obvious that petitioners have failed to read this case. Counsel for the appellant in the *Mulcahy* case were somewhat less confused than counsel for the petitioners here. The court in its decision in the *Mulcahy* case interprets *West* v. *Carter*, 129 Ill. 249, *Harris* v. *McDonald*, 194 Ill. 75, *Boddie* v. *Brewer & Hoffman Brewing Co.*, 204 Ill. 352, and *Pearce* v. *Rice*, 142 U. S. 28, to the same effect that the Circuit Court of Appeals does in the instant case. We submit that *Mulcahy* v. *Vehon*, 229 Ill. 454, is a rather complete analysis of those cases which petitioners have been unable to decipher, and it is positive argument in favor of denying their petition for certiorari.

Manifestly, the petitioners have confused the special statutory proceeding commenced by the respondents in the case at bar, with a suit which invokes the inherent equitable jurisdiction of a court of chancery and with a suit at law to enforce payment of a note the consideration for which was based upon gambling transactions.

It is difficult to conceive of a sincere mistake being made as to the character of the action brought by the respondent. In his complaint the respondent clearly and definitely set forth the Illinois Statutes under which he invoked the court's jurisdiction.

In giving a party to a gambling transaction the right to go into a court of equity and by decree have set aside a contract, note or mortgage arising out of a gambling transaction, the Illinois legislature made clear its intent to create an extraordinary remedy unknown to courts of equity and which would otherwise be barred by the limitations on chancery jurisdiction. To permit invocation of general equitable doctrines in bar of a proceeding expressly granted by Statute would nullify the legislative enactment. A right of action given by the legislature may not be destroyed by legal reasoning or equitable philosophizing. Neither will usurpation of the legislative province by the judiciary be tolerated.

The Circuit Court of Appeals did rely on and apply the law of the Illinois Courts and the United States Supreme Court to the case at bar. It did not construe the Statutes in question for itself in conflict with the established law, but, on the contrary, followed the legislative intent and the decisions of the Illinois and United States Supreme Courts.

II.

On appeal the Courts will adhere to the theory pursued in the trial court.

In the district court in support of the motion to dismiss the petitioners asserted that a court of equity will not adjust disputes arising out of gambling transactions (opinion of the Circuit Court of Appeals, page 24 of Petition

for Certiorari), and admitted the consideration for the chattel mortgage and bill of sale was based on a gambling transaction (R. 24).

In the Circuit Court of Appeals the petitioners reiterated the arguments advanced in the trial court.

It is well settled that the court on appeal will adhere to the theory of the case pursued in the trial court and will not consider contentions resting upon a different theory. *St. Paul Fire and Marine IIns. Co.* v. *Kaufman,* 93 F. 2nd 156.

Petitioners now seek to cast aside this theory in their anxiety to present a case meriting the consideration of this Court. They say in the petition that "it must be remembered that this is not a case where the whole or any part of the consideration was for money won by gaming."

We submit that they can not now change their theory. They directly and positively conceded in the trial court and the Court of Appeals that it was a gambling transaction.

Conclusion.

We respectfully submit the petition sets forth no proper grounds for issuance of the writ of certiorari, that the judgment of reversal and remandment by the Circuit Court of Appeals is right, and that the petition for certiorari should be denied.

Respectfully submitted,

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